

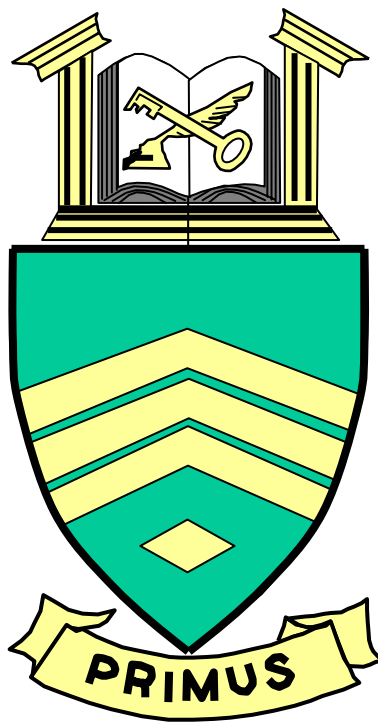
U.S. ARMY SERGEANTS MAJOR ACADEMY (FSC-TATS)

L674 (052002)

JUN 01

PRETRIAL CONFINEMENT

PRERESIDENT TRAINING SUPPORT PACKAGE



Overview

The Army is a uniformed service. Part of your responsibility as a leader is to assist the commander to recognize how regulatory and local policy govern pretrial confinement for the accused soldier within your unit. The reading assignments in this lesson will reinforce your knowledge of the requirements related to this particular subject and help you perform your duties in this area. This lesson consists of two Student Handouts, a Lesson Exercise, and a Solution/Discussion for the Lesson Exercise.

Inventory of Lesson Materials

Prior to starting this lesson ensure you received all materials required for this Training Support Package. Go to the “**This [TSP or Appendix] Contains**” section, on page two of the TSP and the first page of each Appendix, and verify you have all the pages. If you are missing any material, contact the First Sergeant Course Class Coordinator at the training institution where you will attend phase II FSC-TATS.

Point of Contact

If you have any questions regarding this lesson, contact the First Sergeant Course Class Coordinator at the training institution where you will attend phase II FSC-TATS.

PRERESIDENT TRAINING SUPPORT PACKAGE

TSP Number /Title L674
Pretrial Confinement

Effective Date JUN 01

Supersedes TSPs L674, Pretrial Confinement
DEC 99

TSP User This TSP contains a training requirement that you must complete prior to attending phase II, FSC-TATS. It will take you about 1 hour to complete this requirement.

Proponent The proponent for this document is U.S. Army Sergeants Major Academy. POC: FSC Course Chief, DSN: 978-8329/8848; commercial: (915) 568-8329/8848.

Comments and Recommendations Send comments and recommendations on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to:

ATTN ATSS DCF FSC TATS
COMDT USASMA
BLDG 11291 BIGGS FLD
FT BLISS TX 79918-8002

Foreign Disclosure Restrictions The lesson developer in coordination with the USASMA foreign disclosure authority has reviewed this lesson. This lesson is releasable to foreign military students from all requesting foreign countries without restrictions.

**This TSP
Contains**

The following table lists the material included in this TSP:

| Table of Contents | | Page |
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| Lesson | Section I, Administrative Data | 2 |
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| | Section III, Presentation | 5 |
| | Section IV, Summary | 6 |
| | Section V, Student Evaluation | 6 |
| | Section VI, Student Questionnaire | 7 |
| Appendixes | A. Lesson Evaluation and Solutions | Not used |
| | B. Lesson Exercise and Solutions | B-1 |
| | C. Student Handouts | C-1 |

SECTION I ADMINISTRATIVE DATA**Task Trained**

This lesson trains the tasks listed in the following table:

| | |
|------------------------|--|
| Task number: | 877-400-5ACH |
| Task title: | Advise the commander on military justice matters, |
| Conditions: | as a first sergeant, given AR 27-10 and the Manual for Courts-Martial (MCM), |
| Standards: | IAW AR 27-10 and the MCM. |
| Task Proponent: | U. S. Army Sergeants Major Academy |

**Tasks
Reinforced**

None

**Prerequisite
Lessons**

None

**Clearance and
Access**

There is no clearance or access requirement for this lesson.

**Copyright
Statement**

No copyrighted material reproduced for use in this lesson.

References

The following table lists reference(s) for this lesson:

| Number | Title | Date | Additional Information |
|---------------|---|-----------------|-----------------------------------|
| AR 27-10 | Military Justice | 6 Sep 02 | None |
| None | Manual for Courts-Martial, Part V and Subchapter V only. | 2000 Version | None |

**Equipment
Required**

None

**Materials
Required**

None

**Safety
Requirements**

None

**Risk
Assessment
Level**

Low

**Environmental
Considerations**

None

Lesson Approval The following individuals reviewed and approved this lesson for publication and incorporation into the First Sergeant Course--Total Army Training System.

| Name/Signature | Rank | Title | Date |
|----------------|------|-------|------|
|----------------|------|-------|------|

| | | | |
|-----------------|-----|--------------------|--|
| Kevin L. Graham | MSG | Training Developer | |
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| | | | |
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| Chris L. Adams | SGM | Chief Instructor, FSC | |
|----------------|-----|-----------------------|--|

| | | | |
|--------------|-----|------------------------|--|
| John W. Mayo | SGM | Course Chief, FSC-TATS | |
|--------------|-----|------------------------|--|

SECTION II INTRODUCTION

Terminal Learning Objective At the completion of this lesson, you will--

| | |
|--------------------|---|
| Action: | Recognize how regulatory and local policy govern the pretrial confinement of an accused soldier, |
| Conditions: | as a first sergeant in a classroom environment, given SH-1 (Extract from the Manual for Courts-Martial) and SH-2 (Extract from AR 27-10, and DA Form 5112-R), |
| Standard: | Recognized how regulatory and local policies govern the pretrial confinement of an accused soldier IAW SH-1 and SH-2. |

Evaluation Before entering Phase II, you will receive a Phase I written examination that will include questions from the material in this lesson. You must receive a GO to graduate.

Instructional Lead-in A responsibility of the unit first sergeant is to advise the commander on military justice matters for the soldiers within the unit.

SECTION III PRESENTATION

ELO 1

| | |
|--------------------|--|
| Action: | Identify pretrial restraint, |
| Conditions: | as a first sergeant in a classroom environment, given SH-1 and SH-2, |
| Standard: | Identified pretrial restraint IAW SH-1 and SH-2. |

Learning Step/ Activity (LS/A) 1, ELO 1

To complete this learning step activity, you are to—

- Read the above ELO.
- Study Student Handouts 1 and 2, (Appendix C).
- Complete Items 1 and 2 of the Lesson Exercise without referring to the student handouts (Appendix B).

ELO 2

| | |
|--------------------|--|
| Action: | Identify pretrial confinement, |
| Conditions: | as a first sergeant in a classroom environment, given SH-1 and SH-2, |
| Standard: | Identified pretrial confinement IAW SH-1 and SH-2. |

LS/A 1, ELO 2 To complete this learning step activity, you are to—

- Read the above ELO.
- Review Student Handouts 1 and 2, (Appendix C).
- Complete Items 3 and 4 of the Lesson Exercise without referring to the student handouts (Appendix B).

ELO 3

| | |
|--------------------|---|
| Action: | Identify the procedures for review of pretrial confinement, |
| Conditions: | as a first sergeant in a classroom environment, given SH-1 and SH-2, |
| Standard: | Identified the procedures for review of pretrial confinement IAW SH-1 and SH-2. |

LS/A 1, ELO 3 To complete this learning step activity, you are to—

- Read the above ELO.
- Review Student Handouts 1 and 2, (Appendix C).
- Complete Item 5 and 6 of the Lesson Exercise without referring to the student handouts (Appendix B).

SECTION IV SUMMARY

Review/ Summarize Lesson

A first sergeant's duty often requires having to advise the commander on making a decision on when to place a soldier in pretrial restraint or confinement for violations of the UCMJ. In order to accomplish this you must know the regulatory procedures to follow to ensure that you give the commander the proper guidance needed in this area of military justice.

Check on Learning

The Lesson Exercise at Appendix B serves as the Check on Learning.

Transition to Next Lesson

None

SECTION V STUDENT EVALUATION

Testing Requirements

Before entering phase II FSC-TATS, you will receive the end of Phase I Performance Examination that will include questions based on material in this lesson. On that examination, you must correctly answer 35 or more of the questions correctly to achieve a GO. You must receive a GO to graduate.

SECTION VI STUDENT QUESTIONNAIRE

Directions Complete the following blocks:

- Enter your name, your rank, and the date you complete this questionnaire.

| | | |
|-------|-------|-------|
| Name: | Rank: | Date: |
|-------|-------|-------|

- Answer items 1 through 6 below in the space provided.
- Fold the questionnaire so the address for USASMA is visible.
- Print your return address, add postage, and mail.

Note: Your response to this questionnaire will assist the Academy in refining and improving the course. When completing the questionnaire, answer each question frankly. Your assistance helps build and maintain the best Academy curriculum possible.

| | |
|---------------|---|
| Item 1 | Do you feel you have met the learning objectives of this lesson? |
| Item 2 | Was the material covered in this lesson new to you? |
| Item 3 | Which parts of this lesson were most helpful to you in the learning objectives? |
| Item 4 | How could we improve the format of this lesson? |
| Item 5 | How could we improve the content of this lesson? |
| Item 6 | Do you have additional questions or comments? If you do, please list them here. You may add additional pages if necessary |

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Appendix B

Index of Lesson Exercises and Solutions

**This Appendix
Contains**

This Appendix contains the items listed in this table—

| Title/Synopsis | Pages |
|----------------------------|--------------------|
| LE-1, Pretrial Confinement | LE-1-1 to LE-1-2 |
| SLE-1, Solution/Discussion | SLE-1-1 to SLE-1-2 |

LESSON EXERCISE 1**(Self-Graded)****PRETRIAL CONFINEMENT**

- Complete the following items without referring to the Student Handouts.
 - Circle/select the correct answer.
-

Item 1

QUESTION: What are the four types of pretrial restraint?

- a. Conditions on liberty; Restriction in lieu of arrest; Arrest; Confinement.
 - b. Conditions on arrest; Restriction to quarters; Arrest; Confinement.
 - c. Conditions on restriction; Arrest in quarters; Confinement; Pretrial Confinement.
 - d. Conditions on liberty; Restriction in place of confinement; Arrest in quarters; Confinement to quarters.
-

Item 2

QUESTION: IAW the Manual for Courts-Martial (MCM), what is one of the reasons an officer can place a soldier in pretrial restraint?

- a. "The suspected soldier may be a flight risk."
 - b. "The offense is punishable under the rules for confinement."
 - c. "The restraint ordered is required by circumstances."
 - d. "The court-martial convening authority requires it."
-

Item 3

QUESTION: What is pretrial confinement?

- a. A physical restraint, imposed by courts-martial convening authority, to ensure availability of the accused to appear on the date and time specified.
 - b. A restraint of a person, by oral or written order, imposed as a pretrial condition.
 - c. A restraint, which the competent authority must impose when the suspect is of questionable background and character.
 - d. A physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.
-

Item 4

QUESTION: IAW the MCM, what is the reason a commander would place a person in pretrial confinement?

- a. For commission of a crime involving bodily harm or injury.
 - b. For probable cause when there is a reasonable belief that an offense triable by court-martial was committed; the person in custody committed the crime; and confinement is required by the circumstances.
 - c. When charged with an offense tried by general court-martial.
 - d. When the special court-martial convening authority requires it due to the nature of the crime committed.
-

Item 5

QUESTION: What is the Military Magistrate Program?

- a. It is a Command-wide program to review confinement procedures to ensure soldiers are not arbitrarily confined without due process of the judicial system.
 - b. It is a local program to assign magistrates to those soldiers who cannot afford to pay for civilian lawyers (normally lower enlisted personnel).
 - c. It is an Army-wide program for review of pretrial confinement and issuance of search and seizure authorizations, on justifiable cause, by neutral and detached magistrates.
 - d. It is an Army-wide program which assigns a military magistrate appointed by the Judge Advocate (JA) to review pretrial confinement authorizations to ensure compliance with the procedures outlined in the rules of confinement.
-

Item 6

QUESTION: What does the MCM state regarding who may conduct a review and direct release from confinement of a prisoner?

- a. Any commander of a prisoner or an officer appointed under regulations of the Secretary concerned .
 - b. Any Magistrate appointed by the Secretary concerned may conduct a review.
 - c. Only the immediate commander of the prisoner may conduct a review.
 - d. The military lawyer appointed to hear the charges may conduct a review.
-

**SOLUTION/DISCUSSION FOR LESSON EXERCISE 1
(Self-Graded)****Item 1**

QUESTION: What are the four types of pretrial restraint?

a. Conditions on liberty; Restriction in lieu of arrest; Arrest; Confinement.

Reference: SH-1-4, extract of MCM, Rule 304(a)(1) thru (4). (ELO 1)

Item 2

QUESTION: IAW the Manual for Courts-Martial (MCM), what is one of the reasons an officer can place a soldier in pretrial restraint?

c. "The restraint ordered is required by circumstances."

Reference: SH-1-4, extract of MCM, Rule 304(c)(3). (ELO 1)

Item 3

What is pretrial confinement?

d. A physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Reference: SH-1-5, extract of MCM, Rule 305(a). (ELO 2)

Item 4

QUESTION: IAW the MCM, what is the reason a commander would place a person in pretrial confinement?

b. For probable cause when there is a reasonable belief that an offense triable by court-martial was committed; the person in custody committed the crime; and confinement is required by the circumstances.

Reference: SH-1-6, extract of MCM, Rule 305(d). (ELO 2)

Item 5

QUESTION: What is the Military Magistrate Program?

c. It is an Army-wide program for review of pretrial confinement and issuance of search and seizure authorizations, on probable cause, by neutral and detached magistrates.

Reference: SH-2-6, extract of AR 27-10, para 9-1c. (ELO 3)

Item 6

QUESTION: What does the MCM state regarding who may conduct a review and direct release from confinement of a prisoner?

- a. Any commander of a prisoner or an officer appointed under regulations of the Secretary concerned .

Reference: SH-1-6, extract of MCM, Rule 305 (g). (ELO 3)

Appendix C

Index of Student Handouts

**This Appendix
Contains**

This Appendix contains the items listed in this table--

| Title/Synopsis | Pages |
|---|---------------------|
| SH-1, Extract of the Manual for Courts-Martial | SH-1-1 thru SH-1-9 |
| SH-2, Extract of AR 27-10, and a copy of DA Form 5112-R | SH-2-1 thru SH-2-10 |

Student Handout 1

Extract

Pages SH-1-2 through SH-1-9, are paragraphs (Rules 304 and 305) extracted from the Manual for Courts-Martial, 2000 Edition, downloaded from the U.S. Army Publishing Agency (USAPA).

MANUAL

FOR

COURTS-MARTIAL

UNITED STATES

(2000 EDITION)

(EXTRACT)

The 2000 Edition of the MCM is a complete revision of the 1984 MCM incorporating all Executive Orders (EO) through 6 Oct 1999 (EO 12473 promulgating the 1984 MCM; EO 12484, 15 Nov 84; EO 12550, 19 Feb 86; EO 12586, 3 Mar 87; EO 12708, 23 Mar 90; EO 12767, 27 Jun 91; EO 12888, 23 Dec 93; EO 12936, 10 Nov 94; EO 12960, 12 May 95; EO 13086, 27 May 98; EO 13140, 6 Oct 99). Copies of each Executive Order can be found in Appendix 25.

may enter a private dwelling for the purpose of making an apprehension under these rules unless:

(A) Pursuant to consent under Mil. R. Evid. 314(e) of 316(d)(2);

(B) Under exigent circumstances described in Mil. R. Evid. 315(g) or 316(d)(4)(B);

(C) In the case of a private dwelling which is military property or under military control, or non-military property in a foreign country.

(i) if the person to be apprehended is a resident of the private dwelling, there exists, at the time of the entry, reason to believe that the person to be apprehended is present in the dwelling, and the apprehension has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause to apprehend the person exists; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the entry has been authorized by an official listed in Mil. R. Evid. 315(d) upon a determination that probable cause exists to apprehend the person and to believe that the person to be apprehended is or will be present at the time of the entry;

(D) In the case of a private dwelling not included in subsection (e)(2)(C) of this rule,

(i) if the person to be apprehended is a resident of the private dwelling, there exists at the time of the entry, reason to believe that the person to be apprehended is present and the apprehension is authorized by an arrest warrant issued by competent civilian authority; or

(ii) if the person to be apprehended is not a resident of the private dwelling, the apprehension is authorized by an arrest warrant and the entry is authorized by a search warrant, each issued by competent civilian authority.

A person who is not a resident of the private dwelling entered may not challenge the legality of an apprehension of that person on the basis of failure to secure a warrant or authorization to enter that dwelling, or on the basis of the sufficiency of such a warrant or authorization. Nothing in this subsection ((e)(2)) affects the legality of an apprehension which is incident to otherwise lawful presence in a private dwelling.

Discussion

For example, if law enforcement officials enter a private dwelling pursuant to a valid search warrant or search authorization, they may apprehend persons therein if grounds for an apprehension exist. This subsection is not intended to be an independent grant of authority to execute civilian arrest or search warrants. The authority must derive from an appropriate Federal or

state procedure. *See e.g.* Fed. R. Crim. P. 41 and 28 C.F.R. 60.1.

Rule 303. Preliminary inquiry into reported offenses

Upon receipt of information that a member of the command is accused or suspected of committing an offense or offenses triable by court-martial, the immediate commander shall make or cause to be made a preliminary inquiry into the charges or suspected offenses.

Discussion

The preliminary inquiry is usually informal. It may be an examination of the charges and an investigative report or other summary of expected evidence. In other cases a more extensive investigation may be necessary. Although the commander may conduct the investigation personally or with members of the command, in serious or complex cases the commander should consider whether to seek the assistance of law enforcement personnel in conducting any inquiry or further investigation. The inquiry should gather all reasonably available evidence bearing on guilt or innocence and any evidence relating to aggravation, extenuation, or mitigation.

The Military Rules of Evidence should be consulted when conducting interrogations (*see* Mil. R. Evid. 301-306), searches (*see* Mil. R. Evid. 311-317), and eyewitness identifications (*see* Mil. R. Evid. 321).

If the offense is one for which the Department of Justice has investigative responsibilities, appropriate coordination should be made under the Memorandum of Understanding, *see* Appendix 3, and any implementing regulations.

If it appears that any witness may not be available for later proceedings in the case, this should be brought to the attention of appropriate authorities. *See also* R.C.M. 702 (depositions).

A person who is an accuser (*see* Article 1(9)) is disqualified from convening a general or special court-martial in that case. R.C.M. 504(c)(1). Therefore, when the immediate commander is a general or special court-martial convening authority, the preliminary inquiry should be conducted by another officer of the command. That officer may be informed that charges may be preferred if the officer determines that preferral is warranted.

Rule 304. Pretrial restraint

(a) *Types of pretrial restraint.* Pretrial restraint is moral or physical restraint on a person's liberty which is imposed before and during disposition of offenses. Pretrial restraint may consist of conditions

on liberty, restriction in lieu of arrest, arrest, or confinement.

(1) *Conditions on liberty.* Conditions on liberty are imposed by orders directing a person to do or refrain from doing specified acts. Such conditions may be imposed in conjunction with other forms of restraint or separately.

(2) *Restriction in lieu of arrest.* Restriction in lieu of arrest is the restraint of a person by oral or written orders directing the person to remain within specified limits; a restricted person shall, unless otherwise directed, perform full military duties while restricted.

(3) *Arrest.* Arrest is the restraint of a person by oral or written order not imposed as punishment, directing the person to remain within specified limits; a person in the status of arrest may not be required to perform full military duties such as commanding or supervising personnel, serving as guard, or bearing arms. The status of arrest automatically ends when the person is placed, by the authority who ordered the arrest or a superior authority, on duty inconsistent with the status of arrest, but this shall not prevent requiring the person arrested to do ordinary cleaning or policing, or to take part in routine training and duties.

(4) *Confinement.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of offenses. See R.C.M. 305.

Discussion

Conditions on liberty include orders to report periodically to a specified official, orders not to go to a certain place (such as the scene of the alleged offense), and orders not to associate with specified persons (such as the alleged victim or potential witnesses). Conditions on liberty must not hinder pretrial preparation, however. Thus, when such conditions are imposed, they must be sufficiently flexible to permit pretrial preparation.

Restriction in lieu of arrest is a less severe restraint on liberty than is arrest. Arrest includes suspension from performing full military duties and the limits of arrest are normally narrower than those of restriction in lieu of arrest. The actual nature of the restraint imposed, and not the characterization of it by the officer imposing it, will determine whether it is technically an arrest or restriction in lieu of arrest.

Breach of arrest or restriction in lieu of arrest or violation of conditions on liberty are offenses under the code. See paragraphs 16, 19, and 102, Part IV. When such an offense occurs, it may warrant appropriate action such as nonjudicial punishment or court-martial. See R.C.M. 306. In addition, such a breach or violation may provide a basis for the imposition of a more severe form of restraint.

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R.C.M. 707(a) requires that the accused be brought to trial within 120 days of preferral of charges or imposition of restraint under R.C.M. 304(a)(2)-(4).

(b) *Who may order pretrial restraint.*

(1) *Of civilians and officers.* Only a commanding officer to whose authority the civilian or officer is subject may order pretrial restraint of that civilian or officer.

Discussion

Civilians may be restrained under these rules only when they are subject to trial by court-martial. See R.C.M. 202.

(2) *Of enlisted persons.* Any commissioned officer may order pretrial restraint of any enlisted person.

(3) *Delegation of authority.* The authority to order pretrial restraint of civilians and commissioned and warrant officers may not be delegated. A commanding officer may delegate to warrant, petty, and noncommissioned officers authority to order pretrial restraint of enlisted persons of the commanding officer's command or subject to the authority of that commanding officer.

(4) *Authority to withhold.* A superior competent authority may withhold from a subordinate the authority to order pretrial restraint.

(c) *When a person may be restrained.* No person may be ordered into restraint before trial except for probable cause. Probable cause to order pretrial restraint exists when there is a reasonable belief that:

(1) An offense triable by court-martial has been committed;

(2) The person to be restrained committed it; and

(3) The restraint ordered is required by the circumstances.

Discussion

The decision whether to impose pretrial restraint, and, if so, what type or types, should be made on a case-by-case basis. The factors listed in the Discussion of R.C.M. 305(h)(2)(B) should be considered. The restraint should not be more rigorous than the circumstances require to ensure the presence of the person restrained or to prevent foreseeable serious criminal misconduct.

Restraint is not required in every case. The absence of pretrial restraint does not affect the jurisdiction of a court-martial. However, see R.C.M. 202(c) concerning attachment of jurisdiction

tion. *See* R.C.M. 305 concerning the standards and procedures governing pretrial confinement.

(d) *Procedures for ordering pretrial restraint.* Pretrial restraint other than confinement is imposed by notifying the person orally or in writing of the restraint, including its terms or limits. The order to an enlisted person shall be delivered personally by the authority who issues it or through other persons subject to the code. The order to an officer or a civilian shall be delivered personally by the authority who issues it or by another commissioned officer. Pretrial confinement is imposed pursuant to orders by a competent authority by the delivery of a person to a place of confinement.

(e) *Notice of basis for restraint.* When a person is placed under restraint, the person shall be informed of the nature of the offense which is the basis for such restraint.

Discussion

See R.C.M. 305(e) concerning additional information which must be given to a person who is confined. If the person ordering the restraint is not the commander of the person restrained, that officer should be notified.

(f) *Punishment prohibited.* Pretrial restraint is not punishment and shall not be used as such. No person who is restrained pending trial may be subjected to punishment or penalty for the offense which is the basis for that restraint. Prisoners being held for trial shall not be required to undergo punitive duty hours or training, perform punitive labor, or wear special uniforms prescribed only for post-trial prisoners. This rule does not prohibit minor punishment during pretrial confinement for infractions of the rules of the place of confinement. Prisoners shall be afforded facilities and treatment under regulations of the Secretary concerned.

Discussion

(g) *Release.* Except as otherwise provided in R.C.M. 305, a person may be released from pretrial restraint by a person authorized to impose it. Pretrial restraint shall terminate when a sentence is ad-

Offenses under the code by a person under restraint may be disposed of in the same manner as any other offenses. judged, the accused is acquitted of all charges, or all charges are dismissed.

Discussion

Pretrial restraint may be imposed (Or reimposed) if charges are to be reinstated or of a rehearing or "other" trial is to be ordered.

(h) *Administrative restraint.* Nothing in this rule prohibits limitations on a servicemember imposed for operational or other military purposes independent of military justice, including administrative hold or medical reasons.

Discussion

See also R.C.M. 306.

Rule 305. Pretrial confinement

(a) *In general.* Pretrial confinement is physical restraint, imposed by order of competent authority, depriving a person of freedom pending disposition of charges.

Discussion

No member of the armed forces may be placed in confinement in immediate association with enemy prisoners or other foreign nationals not members of the armed forces of the United States. Article 12. However, if members of the armed forces of the United States are separated from prisoners of the other categories mentioned, they may be confined in the same confinement facilities.

(b) *Who may be confined.* Any person who is subject to trial by court-martial may be confined if the requirements of this rule are met.

Discussion

See R.C.M. 201 and 202 and the discussions therein concerning persons who are subject to trial by courts-martial.

(c) *Who may order confinement.* *See* R.C.M. 304(b).

Discussion

"No provost marshal, commander of a guard, or master at arms may refuse to receive or keep any prisoner committed to his charge by a commissioned officer of the armed forces, when the

committing officer furnishes a statement, signed by him, of the offense charged against the prisoner.” Article 11(a).

(d) *When a person may be confined.* No person may be ordered into pretrial confinement except for probable cause. Probable cause to order pretrial confinement exists when there is a reasonable belief that:

- (1) An offense triable by court-martial has been committed;
- (2) The person confined committed it; and
- (3) Confinement is required by the circumstances.

Discussion

The person who directs confinement should consider the matters discussed under subsection (h)(2)(B) of this rule before ordering confinement. However, the person who initially orders confinement is not required to make a detailed analysis of the necessity for confinement. It is often not possible to review a person’s background and character or even the details of an offense before physically detaining the person. For example, until additional information can be secured, it may be necessary to confine a person apprehended in the course of a violent crime.

“[W]hen charged only with an offense normally tried by summary court-martial, [an accused] shall not ordinarily be paced in confinement.” Article 10.

Confinement should be distinguished from custody. Custody is restraint which is imposed by apprehension and which may be, but is not necessarily, physical. Custody may be imposed by anyone authorized to apprehend (*see* R.C.M. 302(b)), and may continue until a proper authority under R.C.M. 304(B) is notified and takes action. Thus, a person who has been apprehended could be physically restrained, but this would not be pretrial confinement in the sense of this rule until a person authorized to do so under R.C.M. 304(b) directed confinement.

(e) *Advice to the accused upon confinement.* Each person confined shall be promptly informed of:

- (1) The nature of the offenses for which held;
- (2) The right to remain silent and that any statement made by the person may be used against the person;
- (3) The right to retain civilian counsel at no expense to the United States, and the right to request assignment of military counsel; and
- (4) The procedures by which pretrial confinement will be reviewed.

(f) *Military counsel.* If requested by the prisoner and such request is made known to military authorities, military counsel shall be provided to the prisoner before the initial review under subsection (i) of

this rule or within 72 hours of such a request being first communicated to military authorities, whichever occurs first. Counsel may be assigned for the limited purpose of representing the accused only during the pretrial confinement proceedings before charges are referred. If assignment is made for this limited purpose, the prisoner shall be so informed. Unless otherwise provided by regulations of the Secretary concerned, a prisoner does not have a right under this rule to have military counsel of the prisoner’s own selection.

(g) *Who may direct release from confinement.* Any commander of a prisoner, an officer appointed under regulations of the Secretary concerned to conduct the review under subsection (i) and/or (j) of this rule, or, once charges have been referred, a military judge detailed to the court-martial to which the charges against the accused have been referred, may direct release from pretrial confinement. For purposes of this subsection, “any commander” includes the immediate or higher commander of the prisoner and the commander of the installation on which the confinement facility is located.

(h) *Notification and action by commander.*

(1) *Report.* Unless the commander of the prisoner ordered the pretrial confinement, the commissioned, warrant, noncommissioned, or petty officer into whose charge the prisoner was committed shall, within 24 hours after that commitment, cause a report to be made to the commander that shall contain the name of the prisoner, the offenses charged against the prisoner, and the name of the person who ordered or authorized confinement.

Discussion

This report may be made by any means. Ordinarily, the immediate commander of the prisoner should be notified. In unusual cases any commander to whose authority the prisoner is subject, such as the commander of the confinement facility, may be notified. In the latter case, the commander so notified must ensure compliance with subsection (h)(2) of this rule.

(2) *Action by commander.*

(A) *Decision.* Not later than 72 hours after the commander’s ordering of a prisoner into pretrial confinement or, after receipt of a report that a member of the commander’s unit or organization has been confined, whichever situation is applicable, the commander shall decide whether pretrial confinement will continue. A commander’s compliance

with this subsection may also satisfy the 48-hour probable cause determination of subsection R.C.M. 305(i)(1) below, provided the commander is a neutral and detached officer and acts within 48 hours of the imposition of confinement under military control. Nothing in subsections R.C.M. 305(d), R.C.M. 305(i)(1), or this subsection prevents a neutral and detached commander from completing the 48-hour probable cause determination and the 72-hour commander's decision immediately after an accused is ordered into pretrial confinement.

(B) *Requirements for confinement.* The commander shall direct the prisoner's release from pretrial confinement unless the commander believes upon probable cause, that is, upon reasonable grounds, that:

- (i) An offense triable by a court-martial has been committed;
 - (ii) The prisoner committed it; and
 - (iii) Confinement is necessary because it is foreseeable that:
 - (a) The prisoner will not appear at trial, pretrial hearing, or investigation, or
 - (b) The prisoner will engage in serious criminal misconduct; and
 - (iv) Less severe forms of restraint are inadequate.
- Serious criminal misconduct includes intimidation of witnesses or other obstruction of justice, serious injury of others, or other offenses which pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of the command, or to the national security of the United States. As used in this rule, "national security" means the national defense and foreign relations of the United States and specifically includes: a military or defense advantage over any foreign nation or group of nations; a favorable foreign relations position; or a defense posture capable of successfully resisting hostile or destructive action from within or without, overt or covert.

Discussion

A person should not be confined as a mere matter of convenience or expedience.

Some of the factors which should be considered under this subsection are:

- (1) The nature and circumstances of the offenses charged or suspected, including extenuating circumstances;
- (2) The weight of the evidence against the accused;
- (3) The accused's ties to the locale, including family, off-duty employment, financial resources, and length of residence;

- (4) The accused's character and mental condition;
- (5) The accused's service record, including any record of previous misconduct;
- (6) The accused's record of appearance at or flight from other pretrial investigations, trials, and similar proceedings; and
- (7) The likelihood that the accused can and will commit further serious criminal misconduct if allowed to remain at liberty.

Although the Military Rules of Evidence are not applicable, the commander should judge the reliability of the information available. Before relying on the reports of others, the commander must have a reasonable belief that the information is believable and has a factual basis. The information may be received orally or in writing. Information need not be received under oath, but an oath may add to its reliability. A commander may examine the prisoner's personnel records, police records, and may consider the recommendations of others.

Less serious forms of restraint must always be considered before pretrial confinement may be approved. Thus the commander should consider whether the prisoner could be safely returned to the prisoner's unit, at liberty or under restriction, arrest, or conditions on liberty. *See* R.C.M. 304.

(C) *72-hour memorandum.* If continued pretrial confinement is approved, the commander shall prepare a written memorandum that states the reasons for the conclusion that the requirements for confinement in subsection (h)(2)(B) of this rule have been met. This memorandum may include hearsay and may incorporate by reference other documents, such as witness statements, investigative reports, or official records. This memorandum shall be forwarded to the 7-day reviewing officer under subsection (i)(2) of this rule. If such a memorandum was prepared by the commander before ordering confinement, a second memorandum need not be prepared; however, additional information may be added to the memorandum at any time.

(i) *Procedures for review of pretrial confinement.*

(1) *48-hour probable cause determination.* Review of the adequacy of probable cause to continue pretrial confinement shall be made by a neutral and detached officer within 48 hours of imposition of confinement under military control. If the prisoner is apprehended by civilian authorities and remains in civilian custody at the request of military authorities, reasonable efforts will be made to bring the prisoner under military control in a timely fashion.

(2) *7-day review of pretrial confinement.* Within 7 days of the imposition of confinement, a neutral and detached officer appointed in accordance with

regulations prescribed by the Secretary concerned shall review the probable cause determination and necessity for continued pretrial confinement. In calculating the number of days of confinement for purposes of this rule, the initial date of confinement under military control shall count as one day and the date of the review shall also count as one day.

(A) *Nature of the 7-day review.*

(i) *Matters considered.* The review under this subsection shall include a review of the memorandum submitted by the prisoner's commander under subsection (h)(2)(C) of this rule. Additional written matters may be considered, including any submitted by the accused. The prisoner and the prisoner's counsel, if any, shall be allowed to appear before the 7-day reviewing officer and make a statement, if practicable. A representative of the command may also appear before the reviewing officer to make a statement.

(ii) *Rules of evidence.* Except for Mil. R. Evid., Section V (Privileges) and Mil. R. Evid. 302 and 305, the Military Rules of Evidence shall not apply to the matters considered.

(iii) *Standard of proof.* The requirements for confinement under subsection (h)(2)(B) of this rule must be proved by a preponderance of the evidence.

(B) *Extension of time limit.* The 7-day reviewing officer may, for good cause, extend the time limit for completion of the review to 10 days after the imposition of pretrial confinement.

(C) *Action by 7-day reviewing officer.* Upon completion of review, the reviewing officer shall approve continued confinement or order immediate release.

(D) *Memorandum.* The 7-day reviewing officer's conclusions, including the factual findings on which they are based, shall be set forth in a written memorandum. A copy of the memorandum and of all documents considered by the 7-day reviewing officer shall be maintained in accordance with regulations prescribed by the Secretary concerned and provided to the accused or the Government on request.

(E) *Reconsideration of approval of continued confinement.* The 7-day reviewing officer shall upon request, and after notice to the parties, reconsider the decision to confine the prisoner based upon any significant information not previously considered.

(j) *Review by military judge.* Once the charges for

which the accused has been confined are referred to trial, the military judge shall review the propriety of pretrial confinement upon motion for appropriate relief.

(1) *Release.* The military judge shall order release from pretrial confinement only if:

(A) The 7-day reviewing officer's decision was an abuse of discretion, and there is not sufficient information presented to the military judge justifying continuation of pretrial confinement under subsection (h)(2)(B) of this rule;

(B) Information not presented to the 7-day reviewing officer establishes that the prisoner should be released under subsection (h)(2)(B) of this rule; or

(C) The provisions of subsection (i)(1) or (2) of this rule have not been complied with and information presented to the military judge does not establish sufficient grounds for continued confinement under subsection (h)(2)(B) of this rule.

(2) *Credit.* The military judge shall order administrative credit under subsection (k) of this rule for any pretrial confinement served as a result of an abuse of discretion or failure to comply with the provisions of subsections (f), (h), or (i) of this rule.

(k) *Remedy.* The remedy for noncompliance with subsections (f), (h), (i), or (j) of this rule shall be an administrative credit against the sentence adjudged for any confinement served as the result of such noncompliance. Such credit shall be computed at the rate of 1 day credit for each day of confinement served as a result of such noncompliance. The military judge may order additional credit for each day of pretrial confinement that involves an abuse of discretion or unusually harsh circumstances. This credit is to be applied in addition to any other credit the accused may be entitled as a result of pretrial confinement served. This credit shall be applied first against any confinement adjudged. If no confinement is adjudged, or if the confinement adjudged is insufficient to offset all the credit to which the accused is entitled, the credit shall be applied against hard labor without confinement, restriction, fine, and forfeiture of pay, in that order, using the conversion formula under R.C.M. 1003(b)(6) and (7). For purposes of this subsection, 1 day of confinement shall be equal to 1 day of total forfeiture or a like amount of fine. The credit shall not be applied against any other form of punishment.

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(1) *Confinement after release.* No person whose release from pretrial confinement has been directed by a person authorized in subsection (g) of this rule may be confined again before completion of trial except upon the discovery, after the order of release, of evidence or of misconduct which, either alone or in conjunction with all other available evidence, justifies confinement.

Discussion

See R.C.M. 304(b) concerning who may order confinement.

(m) *Exceptions.*

(1) *Operational necessity.* The Secretary of Defense may suspend application of subsections (e)(2) and (3), (f), (h)(2)(A) and (C), and (i) of this rule to specific units or in specified areas when operational requirements of such units or in such areas would make application of such provisions impracticable.

(2) *At sea.* Subsections (e)(2) and (3), (f), (h)(2)(C), and (i) of this rule shall not apply in the case of a person on board a vessel at sea. In such situations, confinement on board the vessel at sea may continue only until the person can be transferred to a confinement facility ashore. Such transfer shall be accomplished at the earliest opportunity permitted by the operational requirements and mission of the vessel. Upon such transfer the memorandum required by subsection (h)(2)(C) of this rule shall be transmitted to the reviewing officer under subsection (i) of this rule and shall include an explanation of any delay in the transfer.

Discussion

Under this subsection the standards for confinement remain the same (although the circumstances giving rise to the exception could bear on the application of those standards). Also, pretrial confinement remains subject to judicial review. The prisoner's commander still must determine whether confinement will continue under subsection (h)(2)(B) of this rule. The suspension of subsection (h)(2)(A) of this rule removes the 72-hour requirement since in a combat environment, the commander may not be available to comply with it. The commander must make the pretrial confinement decision as soon as reasonably possible, however. (This provision is not suspended under subsection (2) since the commander of a vessel is always available.)

Rule 306. Initial disposition

(a) *Who may dispose of offenses.* Each commander has discretion to dispose of offenses by members of that command. Ordinarily the immediate commander of a person accused or suspected of committing an offense

triable by court-martial initially determines how to dispose of that offense. A superior commander may withhold the authority to dispose of offenses in individual cases, types of cases, or generally. A superior commander may not limit the discretion of a subordinate commander to act on cases over which authority has not been withheld.

Discussion

Each commander in the chain of command has independent, yet overlapping discretion to dispose of offenses within the limits of that officer's authority. Normally, in keeping with the policy in subsection (b) of this rule, the initial disposition decision is made by the official at the lowest echelon with the power to make it. A decision by a commander ordinarily does not bar a different disposition by a superior authority. See R.C.M. 401(c); 601(0). Once charges are referred to a court-martial by a convening authority competent to do so, they may be withdrawn from that court-martial only in accordance with R.C.M. 604.

See Appendix 3 with respect to offenses for which coordination with the Department of Justice is required.

(b) *Policy.* Allegations of offenses should be disposed of in a timely manner at the lowest appropriate level of disposition listed in subsection (c) of this rule.

Discussion

The disposition decision is one of the most important and difficult decisions facing a commander. Many factors must be taken into consideration and balanced, including, to the extent practicable, the nature of the offenses, any mitigating or extenuating circumstances, the character and military service of the accused, any recommendations made by subordinate commanders, the interest of justice, military exigencies, and the effect of the decision on the accused and the command. The goal should be a disposition that is warranted, appropriate, and fair.

In deciding how an offense should be disposed of, factors the commander should consider, to the extent they are known, include:

- (A) the character and military service of the accused;
- (B) the nature of and circumstances surrounding the offense and the extent of the harm caused by the offense, including the offense's effect on morale, health, safety, welfare, and discipline;
- (C) appropriateness of the authorized punishment to the particular accused or offense;
- (D) possible improper motives of the accuser;
- (E) reluctance of the victim or others to testify;
- (F) cooperation of the accused in the apprehension or conviction of others;

Student Handout 2**Extract**

Pages SH-2-2 through SH-2-8 are extracts from AR 27-10, dated 6 Sep. 02, downloaded from the U.S. Army Publishing Agency (USAPA) of paragraphs 5-12 – 5-21, and 9-1 – 9-13. SH-2-9 – SH-2-10 is a copy of DA Form 5112-R, (Checklist for Pretrial Confinement).

Army Regulation 27-10

Legal Services

Military Justice

(EXTRACT)

**Headquarters
Department of the Army
Washington, DC
6 September 2002**

5-12. Authorization for payment of transportation expenses and allowances to civilian witnesses appearing before Article 32, UCMJ, investigations

- a.* A civilian witness, determined to be reasonably available under R.C.M. 405(g) and requested to testify before an Article 32, UCMJ, investigation, is authorized transportation expenses and allowances.
- b.* Civilian witnesses will not be requested to appear before an Article 32, UCMJ, investigation until payment of the transportation expenses and allowances has been approved by the GCMCA. The authority to approve, but not disapprove, the payment of transportation expenses and allowances may be delegated to the investigating officer or the GCMCA's SJA. An approved request to appear will inform the witness of the pertinent entitlements.

5-13. Reports and investigation of offenses

Any military authority, including a military law enforcement agency, that receives a report of a serious offense, will advise the trial counsel at the initiation of and critical stages in the investigation. The Commanding General, United States Army Criminal Investigation Command (USACIDC) may approve exceptions to this requirement on a case-by-case basis. Trial counsel will confer regularly about all developing cases with local CID and MP personnel. Trial counsel should work closely with and provide legal advice to investigative entities throughout the investigative process.

**Section III
Pretrial****5-14. Pretrial confinement**

- a. General.* An accused pending charges should ordinarily continue the performance of normal duties within the accused's organization while awaiting trial. In any case of pretrial confinement, the SJA concerned, or that officer's designee, will be notified prior to the accused's entry into confinement or as soon as practicable afterwards.

5-15. Preparation of charge sheet

- a.* R.C.M. 307 and DD Form 458 (Charge Sheet) provide instructions in the preparation of charges and specifications. (DD Form 458 is approved for electronic generation; see appendix 4 of the MCM for an example of a properly prepared charge sheet.) Available data as to service, social security account number, and similar items required to complete the first page of the charge sheet will be included. The original will be forwarded (para 5-16) and signed. If several accused are charged on one charge sheet with the commission of a joint offense (R.C.M. 307(c)(5)), the complete personal data for each accused will appear on the first page of the charge sheet or on an attached copy. An extra signed copy of the charge sheet will be prepared for each additional accused.
- b.* After any charge is preferred, the DD Form 458 will automatically act to suspend all favorable personnel actions, including discharge, promotion, and reenlistment. Filing of a DA Form 268 (Suspension of Favorable Personnel Action) and other related personnel actions are still required. Failure to file DD Form 268 does not affect the suspension accomplished by the DD Form 458, or give rise to any rights to the soldier. See AR 600-8-2 (Suspension of Favorable Personnel Actions (FLAGS)). After preferal of a charge, regardless of any action purporting to discharge or separate a soldier, any issuance of a discharge certificate is void until the charge is dismissed or the convening authority takes initial action on the case in accordance with R.C.M. 1107; all other favorable personnel actions taken under such circumstances are voidable. Notwithstanding preferal of a charge, any GCMCA, the Assistant Secretary of the Army for Manpower and Reserve Affairs or the Assistant Secretary's delegee may approve exceptions to this subparagraph.

5-16. Forwarding of charges

- a.* When trial by a SPCM or GCM is appropriate and the officer exercising SCM jurisdiction is not empowered to convene such a court (R.C.M. 504(b)), the officer exercising SCM jurisdiction will personally decide whether to forward the charges and allied papers. (See R.C.M. 401 through 403.)
- b.* Charges and allied papers ordinarily will be forwarded through the chain-of-command to the officer exercising the appropriate kind of court-martial jurisdiction. The charges will be forwarded by endorsement or memorandum of transmittal signed by the SCM authority or authenticated with that officer's command line recommending disposition of the charges. (See R.C.M. 401(c)(2), Discussion.)
- c.* Before referral, all requests for pretrial delay, together with supporting reasons, will be submitted to the convening authority before whom the charge(s) is/are pending for resolution. Pretrial delay should not be granted ex parte; when practicable, the decision granting delay together with supporting reasons and the dates covering the delay should be reduced to writing. Before referral, the convening authority who has the charges may delegate the authority to grant delays to an Article 32 investigating officer. This delegation should be made in writing. After referral, all requests for pretrial delay will be submitted to the military judge for resolution.

5-17. Convening authority actions upon receipt of approved resignation for the good of the service in lieu of general court-martial The tender of a receipt of approved resignation for the good of the service (RFGOS) does not preclude or suspend courts-martial procedures. Commands may proceed with courts-martial, but the convening authority may not act on the findings and sentence of the court until the Secretary of the Army or his delegate acts on the RFGOS. The command should expeditiously process the RFGOS to CDR, PERSCOM and not hold it in abeyance for any reason (AR 600-8-24, paragraph 3-13e). In the event a court-martial is completed prior to action on the RFGOS, the SJA will immediately notify the Commander, PERSCOM of the findings and sentence of the court-martial. No action will be taken to approve the findings and sentence, however, pending a decision on the RFGOS. If the convening authority receives an approved RFGOS from the Secretary of the Army or his delegate, the convening authority must—

- a. Immediately release the accused from confinement, whether pretrial or post-trial, and
- b. Disapprove findings only upon evidence of the approving authority's specific intent to vacate the entire courtmartial proceedings. Absent this intent, continue to process the case through the appellate process and
- c. Disapprove the sentence and dismiss any pending charges.

5-18. Referral of charges

a. The convening authority will personally determine whether to refer the charges for trial and the kind of court to which the charges will be referred. This function may not be delegated. The endorsement or other directive referring the charges to a court-martial for trial will be signed by the convening authority or will be authenticated with the convening authority's command line. A warrant or noncommissioned officer may not act in a capacity as an adjutant or assistant adjutant to authenticate a command line (see AR 614-100). He or she must have prior signature authority under AR 25-50. Use of the command line verifies that the commander has personally acted (R.C.M. 601(e)).

b. The convening authority or the convening authority's designee will notify HQDA (DAJA-CL) of the following information on referral of a case capital (this information is exempt under AR 335-15 from management information control):

- (1) Name, grade, SSN, date of birth, race, and unit of the accused.
- (2) The offenses with which the accused is charged.
- (3) The names, sex, ages, and military or civilian status of the victims.
- (4) The date of referral.
- (5) Whether the accused is in pretrial confinement and the date confinement began.
- (6) The names of the military judge, trial counsel, and defense counsel in the case.

5-19. Accused's copy of charge sheet

a. *Summary courts-martial.* At the opening session of the trial, before arraignment, the SCM officer will give the accused a copy of the charge sheet, as received and corrected by the officer.

b. *General and special courts-martial.* Immediately on receipt of charges referred for trial, the trial counsel of a GCM or SPCM will—

- (1) Serve (or cause to be served) on the accused a copy of the charge sheet, as received and corrected by the counsel.
- (2) Inform the defense counsel that this copy has been served (R.C.M. 602, Discussion).

5-20. Preliminary procedures

a. *Docketing and calendar management.*

(1) Immediately on referral of charges for trial, the trial counsel will—

(a) Serve or cause the charges to be served on the accused.

(b) Furnish a copy of the charges and specifications to the defense counsel and trial judge detailed to the courtmartial.

(2) If the accused has been or is under pretrial restraint, the trial counsel will inform the trial judge of its nature and duration.

Regardless of pretrial restraint, the trial counsel will inform the trial judge promptly of all referred cases. When the trial judge receives the charges and specifications, the trial judge will in all cases set the case for trial at an early date. The date should be within 20 days of the service of charges on the accused for a GCM and within 10 days for a SPCM.

(3) Docketing procedures may include—

(a) Requesting mutually recommended dates from counsel within time limits set by the judge.

(b) Conferences under R.C.M. 802.

(c) Article 39(a), UCMJ, sessions.

(4) The procedure used must ensure an early and orderly disposition of charges, so that—

(a) The right of the accused to a speedy trial is assured.

(b) The right of the Government to prompt resolution of charges in the interest of good order and discipline is assured.

(5) As part of the docketing procedure, counsel should report to the judge—

(a) Anticipated pleas.

(b) Estimated duration of proceedings.

(c) Whether the trial will be by judge alone.

(6) Once the military judge has set a date for trial, a party moving for continuance must present full justification as provided by law. If final disposition occurs by other means, such as administrative separation, counsel will advise the trial judge immediately.

(7) In computing the time periods above, the day that charges are served on the accused will be excluded. The last day of the period will be included unless it falls on Saturday, Sunday, or a legal holiday.

b. Court-martial sessions without members under Article 39(a), UCMJ.

(1) Sessions under Article 39, UCMJ, will be called on order of the military judge; however, either the trial counsel or defense counsel may make application to the military judge to have such a session called. In requesting an Article 39(a), UCMJ, session, counsel should give opposing counsel adequate opportunity to prepare. Before the day of the session, counsel will serve on the opposing counsel and provide the trial judge with written notice of all motions and other matters for disposition. The notice will inform opposing counsel and the judge whether submission will be on brief only, by oral argument, or both and whether evidence will be presented. The notice will include—

(a) A statement of the substance of the matter.

(b) The points and authorities on which counsel will rely.

(2) Counsel are encouraged to submit briefs to the military judge and opposing counsel before Article 39(a), UCMJ, sessions, outlining and citing authority for their position. Counsel will be prepared to dispose of all motions (other than those based on evidence on the merits) and all other interlocutory issues at the Article 39(a), UCMJ, session. This will be the first session held in a case other than for docketing. The foregoing does not preclude matters from being raised and disposed of at the Article 39(a), UCMJ, session other than those contained in the counsel's notice form.

(3) Motion sessions will be scheduled and conducted so that interlocutory matters will be promptly decided and dilatory or piece-meal presentations will be precluded. (See R.C.M. 905 through 907, as to waiver of issues by failure to present timely motions for relief.)

c. Excusal of members. Prior to assembly of a court-martial, detailed members may be excused by the convening authority. The convening authority may delegate the preassembly excusal authority to a deputy or assistant commander, the chief of staff, or the SJA. After assembly of the members, members may be excused for good cause only by the detailed military judge or the convening authority (see R.C.M. 505).

5–21. Witness attendance

a. Subpoenas. A subpoena must be sent certified first class mail, return receipt requested, and restricted delivery may be used for formal service of subpoenas (R.C.M. 703(e)(2)(D) and Discussion).

b. Warrants of attachment. When it is necessary to issue a warrant of attachment, the military judge or the convening authority, if there is no military judge, will use DD Form 454 (Warrant of Attachment). (Approved for electronic generation; see app A of this regulation for specific instructions.) A warrant of attachment may be executed by a United States Marshal or such other person who is not less than 18 years of age as the authority issuing the warrant may direct. When practicable, execution should be effected through a civilian officer of the United States (R.C.M. 703(e)(2)(g) and Discussion).

c. Arrangements for travel overseas. See paragraph 18–22 of this regulation for arrangements for travel of civilian witnesses to proceedings overseas.

d. Expert witness payment. Within the United States payments to expert witnesses will be pursuant to the DOJ Expert Witness Rate Schedule. For trial outside the United States, the schedule should be considered as a guide.

Chapter 9 Military Magistrate Program

Section I General

9–1. Scope

- a. This chapter establishes the Army Military Magistrate Program. It authorizes and specifies procedures for the appointment and assignment of military magistrates and for their use to review pretrial confinement (R.C.M. 305(i)). It implements the Military Rules of Evidence (MRE), Rules 315 and 316, part III, MCM and R.C.M. 302(e)(2), by authorizing military judges and magistrates to issue necessary search, seizure, and apprehension authorizations on probable cause.
- b. There is no relationship between the Military Magistrate Program and DA's implementation of the Federal Magistrate System to dispose judicially of uniform violation notices and minor offenses committed on military installations (AR 190–29).
- c. The Military Magistrate Program is an Army-wide program for review of pretrial confinement and the issuance of search, seizure, and apprehension authorizations, on probable cause, by neutral and detached magistrates.
- d. A military magistrate is a JA empowered to direct the release of persons from pretrial confinement, or to recommend release from confinement pending final disposition of foreign criminal charges, on a determination that continued confinement does not meet legal requirements, and to issue search, seizure, and apprehension authorizations on probable cause.
- e. An assigned military magistrate is a JA appointed by TJAG or TJAG's designee and assigned to USALSA, a military judge assigned to the U.S. Army Trial Judiciary, or an individual mobilization augmentee ordered to annual training with duty as a military judge.
- f. A part-time military magistrate is a JA (active Army or USAR) not assigned to USALSA, appointed by TJAG or TJAG's designee, who is authorized to perform the duties of a magistrate.
- g. The supervising military judge is a military judge assigned to the U.S. Army Trial Judiciary designated to supervise the activities of military magistrates within the supervising military judge's jurisdiction.

9–2. Appointment of military magistrates

- a. *Assigned military magistrates.* Assigned military magistrates will be appointed by TJAG or TJAG's designee upon recommendation by the Chief Trial Judge, U.S. Army Trial Judiciary.
- b. *Part-time military magistrates.* Part-time military magistrates will be appointed by TJAG or, if the authority to appoint such magistrates is delegated by TJAG, by the Commander, USALSA, the Chief Trial Judge, chief circuit judges, and supervising military judges, as follows:
 - (1) SJAs may nominate one or more JAs for appointment as part-time military magistrates.
 - (2) Nominees will not be engaged in criminal investigation or the prosecuting function and will possess the requisite training, experience, and maturity to perform the duties of a magistrate.
 - (3) Nominations will be forwarded to the appropriate designee of TJAG. The designee will forward the names of appointed part-time military magistrates to the Chief Trial Judge, U.S. Army Trial Judiciary (JALS–TJ), U.S. Army Legal Services Agency, 901 N. Stuart Street, Arlington, VA 22203.

9–3. Powers of military magistrates

- a. *Review of confinement.*
 - (1) Assigned military magistrates will be given responsibility for reviewing pretrial confinement in any confinement facility as TJAG or TJAG's designees will direct.
 - (2) Part-time military magistrates will be given responsibility for reviewing pretrial confinement as determined by the supervising military judge.
- b. *Issuance of search, seizure, and apprehension authorizations.* Any military magistrate, whether assigned or parttime, is authorized to issue search and seizure and search and apprehension authorizations on probable cause under section III of this chapter.
- c. *Review of confinement pending outcome of foreign criminal charges.* Military magistrates, whether assigned or part-time, are authorized to review confinement of soldiers, in U.S. facilities, pending final disposition, including appeals, of foreign criminal charges (see chap 17). (Final disposition of foreign criminal charges incorporates all stages of the host country's criminal proceedings, including appeals, up to commencement of any sentence to confinement resulting from conviction on the foreign criminal charges.)

9–4. Supervision of military magistrates

- a. *The Chief Trial Judge, U.S. Army Trial Judiciary.* The Chief Trial Judge, U.S. Army Trial Judiciary, under the supervision of the Commander, USALSA, is responsible for the general administration of the Military Magistrate Program. These responsibilities include—
 - (1) Making recommendations to TJAG on the appointment of military magistrates and other aspects of the program.

- (2) Establishing programs for training assigned and part-time military magistrates.
 - (3) Recommending duty stations at which assigned military magistrates will be located.
 - (4) Assignment of responsibility for servicing particular confinement facilities.
 - (5) Designating supervising military judges.
 - (6) Monitoring rating schemes for military magistrates.
 - (7) Designating raters and senior raters of OERs for assigned military magistrates.
- b. Supervising military judge.* The supervising military judge will be responsible for the direct supervision of military magistrates, assigned or part-time, in the performance of magisterial duties.

Section II

Pretrial Confinement

9–5. Review by military magistrate

a. General.

- (1) All military magistrates, whether assigned or part-time, are empowered to order the release from pretrial confinement of any confinee in any U.S. Army confinement facility on determination (following review of the case) that continued pretrial confinement does not satisfy legal requirements. The military magistrate will consider all relevant facts and circumstances surrounding each case of pretrial confinement in arriving at this decision. Military magistrates will review each case of pretrial confinement according to the procedures and criteria contained in R.C.M. 305(i) and this paragraph.
- (2) Part-time military magistrates will be appointed to review pretrial confinement in all cases at confinement facilities not normally served by assigned military magistrates. Whoever initially authorizes pretrial confinement in a facility not administered by the Army will immediately notify the officer exercising GCM jurisdiction over the person confined. This officer will immediately cause the responsible military magistrate to be notified of the case.
- (3) Unless an Army magistrate has conducted a pretrial confinement review pursuant to paragraph 9–5*b*, the review of pretrial confinement of a soldier of the U.S. Army will be governed by the military magistrate regulations of the Armed Force that has jurisdiction over the place of confinement. Soldiers ordered into pretrial confinement will be confined in Army confinement facilities whenever practicable.
- (4) Service members of other Armed Forces ordered into pretrial confinement in Army confinement facilities will be subject to the provisions of this section, unless specific exceptions to these provisions, consistent with R.C.M. 305, are requested in writing by an officer of the other Armed Force.

b. Procedures.

- (1) The military magistrate will review pretrial confinement in accordance with R.C.M. 305(i). The magistrate's decision to approve pretrial confinement is subject to a request for reconsideration (see R.C.M. 305(i)(2) pertaining to reconsideration of a decision to approve confinement) under the provisions of this paragraph. Once charges for which the accused has been confined are referred, the accused may seek review of the propriety of pretrial confinement in accordance with R.C.M. 305(j). Nothing in this paragraph will preclude an accused from seeking extraordinary relief.
A copy of the magistrate's memorandum to approve or disapprove pretrial confinement, required by R. C. M. 305(i)(2)(D), will be served on the SJA or his/her designee and, upon request, to the accused or the accused's defense counsel. Upon order of the magistrate, an accused will be released immediately from pretrial confinement in accordance with R.C.M. 305(i)(5).
- (2) The commander of the person confined, on ordering confinement or receiving notification of confinement, will provide the military magistrate with a completed DA Form 5112. The commander will include (in the appropriate area of the pretrial confinement block) or attach to the DA Form 5112 a statement of the basis for the decision to confine (see R.C.M. 305(h)(2)(c)).
- (3) Military magistrates may not impose conditions on release from confinement, but may recommend appropriate conditions to the unit commander.
- (4) The unit commander concerned may impose any authorized pretrial restraint deemed necessary on a person who has been released from confinement by a magistrate. However, the unit commander may not order the return of that person to pretrial confinement except when an additional offense is committed or on receipt of newly discovered information (see R.C.M. 305(l)). The military magistrate will be immediately notified of any reconfinement and the reasons therefore.
- (5) Circumstances of soldiers who, after release by a military magistrate, are reconfined will be reviewed by the military magistrate. The determination of whether continued pretrial confinement is warranted will be made on the same legal basis as the review and determination for initial pretrial confinement.
- (6) The military magistrate will communicate the decision in each case to the soldier confined or the soldier's defense counsel. This may be accomplished by means of a copy of the written record of decision. In addition, a record of the magistrate's decision(s) will be filed in that soldier's correctional treatment file (see AR 190–47).
- (7) Copies of the DA Form 5112 as completed by the commander and the magistrate's memorandum approving or disapproving pretrial confinement will be included in the Record of Trial.

9–6. Administrative and logistical support

The provisions of paragraph 8–7 of this regulation pertaining to members of the U.S. Army Trial Judiciary are also applicable to assigned military magistrates.

Section III

Search, Seizure, and Apprehension Authorizations

9–7. Authority of military judges and magistrates to issue authorizations

The following are authorized to issue search and seizure and search and apprehension authorizations on probable cause (MRE 315(d)(2)) with respect to persons and property specified in MRE 315(c):

- a.* Military judges assigned or attached to, or USAR military judges assigned to or under technical supervision of, the U.S. Army Trial Judiciary.
- b.* Military magistrates assigned to USALSA.
- c.* Part-time military magistrates appointed under paragraph 9–2*b* of this regulation.

9–8. Issuance

- a.* The procedures for issuing of search and seizure and search and apprehension authorizations are contained in the MRE. Authorizations to search and seize or search and apprehend may be issued on the basis of a written or oral statement, electronic message, or other appropriate means of communication. Information provided in support of the request for authorization may be sworn or unsworn. The fact that sworn information is generally more credible and often entitled to greater weight than information not given under oath should be considered.
- b.* DA Form 3744 (Affidavit Supporting Request for Authorization to Search and Seize or Apprehend) may be used if the supporting information is to be sworn. A sample completed affidavit is shown at figure 9–1 of this regulation. Authorizations to search and seize or search and apprehend may be issued orally or in writing. DA Form 3745 (Search and Seizure Authorization) or DA Form 3745–1 (Apprehension Authorization) may be used if an authorization is issued in writing.

9–9. Oaths

See chapter 11 for the authority, procedures, and forms for administering oaths to persons providing information to commanders and other military personnel empowered to issue authorizations to search and seize.

9–10. Execution and disposition of authorizations and other related papers

- a. Execution.* MRE 315(h) governs the execution of authorizations to search and seize. In addition to those requirements, the authorization should be executed within 10 days after the date of issue. An inventory of the property seized will be made at the time of the seizure or as soon as practicable. A copy of the inventory will be delivered to the person from whose possession or premises the property was taken. DA Form 4137 (Evidence/Property Custody Document) may be used.
- b. Disposition of authorization and other papers.* After the authorization has been executed, the authorization and a copy of the inventory will be returned to the issuing authority. Thereafter, all documents and papers relative to the search or seizure will be transmitted to the appropriate law enforcement office. They will be filed for use in any future litigation or proceeding on the results of such a search.

9–11. Recovery and disposition of property

- a. Evidence retained for courts-martial.* Evidence retained for courts-martial will be disposed of according to applicable regulations. SJAs will make every effort to return property, when appropriate, as expeditiously as possible by substituting photographic or written descriptions when such measures will not jeopardize pending prosecutions.
- b. Property seized by the U.S. Army Criminal Investigation Command (USACIDC).* The provisions of AR 195–5 govern the recovery and disposition of property seized pursuant to an authorization to search and seize conducted by U.S. Army criminal investigators.
- c. Property seized by other authorized persons.* The provisions of AR 190–22, chapter 3, govern the recovery and disposition of property seized pursuant to a search or seizure by other authorized persons.

9–12. Reapplication

Any person requesting authorization to search and seize must disclose to the issuing authority any knowledge that person has of denial of any previous request for a search and seizure authorization involving the same individual and the same property.

9–13. Legality of searches and seizures

The requirements set forth in this chapter are administrative only and the failure to comply does not, in and of itself, render the search or seizure unlawful within the meaning of MRE 311.

| M | TAB | TAB | TAB | TAB | TAB | TAB | TAB | TAB |
|---|-----|------|---|---------|-----|--|-----|-----|
| CHECKLIST FOR PRETRIAL CONFINEMENT | | | | | | | | |
| <small>For use of this form, see AR 27-10; the proponent agency is TJAG</small> | | | | | | | | |
| NAME | | | GRADE | | | UNIT | | |
| AGE | | | ETS | | | TOTAL SERVICE TO DATE | | |
| MARRIED ____ YES ____ NO | | | WIFE/HUSBAND IN LOCAL AREA ____ YES ____ NO | | | NUMBER OF CHILDREN ____ 1 ____ 2 ____ 3 ____ OTHER (Specify) | | |
| NUMBER OF ARTICLE 15's: | | | | | | | | |
| DATE | | | OFFENSE | | | PUNISHMENT | | |
| NUMBER OF PREVIOUS CONVICTIONS: | | | | | | | | |
| TYPE OF COURT | | DATE | | ARTICLE | | PUNISHMENT | | |
| NUMBER OF PRESENT OFFENSES: | | | | | | | | |
| ARTICLE | | | DATE | | | DESCRIPTION OF OFFENSE (If A.M.O.L., from to, etc., and whether surrendered or apprehended) | | |

PRETRIAL CONFINEMENT IS APPROPRIATE BECAUSE:

- a. There is probable cause to believe an offense has been committed by the accused. (List specific reasons why it is believed an offense has been committed by the accused.)

M TAB TAB

b. To ensure the accused's presence at trial, pretrial hearing or investigation. (List specific reasons why it is believed the accused may not be present and summarize the conduct of the accused which warrants pretrial confinement and tends to indicate the accused is not likely to be available for trial, pretrial hearing or investigation.)

c. To prevent foreseeable serious criminal misconduct including any efforts at obstructing justice. (List specific reasons why it is believed the accused may commit acts of serious criminal misconduct if not incarcerated, particularly if these acts pose a threat to others, the command or national security, and summarize the conduct of the accused which warrants pretrial confinement and tends to indicate the accused may commit future acts of serious criminal misconduct.)

d. Lesser forms of restraint are inadequate. (List the alternatives that have proven inadequate or summarize the reasons why it is believed such alternatives would be inadequate.)

DATE TYPED NAME, RANK, AND ORGANIZATION OF COMMANDER SIGNATURE

DECISION OF MILITARY MAGISTRATE

TO: (Addressee(s)) DATE

On _____, I reviewed the circumstances concerning the continued pretrial confinement of _____ (Date)

Based upon this review, I: (Check appropriate statement)
(Name)

_____ Determined that continued pretrial confinement is warranted.

_____ Determined that continued pretrial confinement is not warranted and order his/her release from pretrial confinement.

TYPED NAME, GRADE, AND BRANCH OF MILITARY MAGISTRATE SIGNATURE

USAMPS 81.00